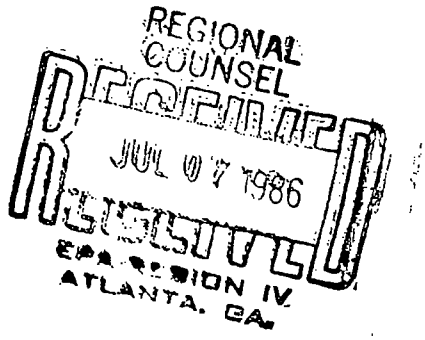
UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RALPH C. MEDLEY; CLYDE MEDLEY, GRACE MEDLEY AND BARRY MEDLEY, INDIVIDUALLY AND d/b/a MEDLEY'S CONCRETE WORKS; MILLIKEN & COMPANY; UNISPHERE CHEMICAL CORPORATION; NATIONAL STARCH AND CHEMICAL CORPORATION, Defendants,	Civil Action No. 7:86-252-3
MILLIKEN & COMPANY, Third-Party Plaintiff, vs. ABCO INDUSTRIES, INC.; BASF CORPORATION; ETHOX CHEMICALS, INC.; POLYMER INDUSTRIES, a division of MORTON-THIOKOL, INC.; AND TANNER CHEMICAL COMPANY, Third-Party Defendants.	ORDER DENYING THIRD-PARTY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AGAINST THIRD-PARTY PLAINTIFFS' MILLIKEN & COMPANY AND NATIONAL STARCH AND CHEMICAL CORPORATION

INTRODUCTION

This matter has come before the court on the motion of third-party defendants, ABCO Industries, Inc., BASF Corporation, Polymer Industries, a division of Morton-Thiokol, Inc., and Tanner Chemical Company, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment or, in the alternative, for partial summary judgment against third-party plaintiffs


REGIONAL
COUNSEL
RECEIVED
JUL 07 1986
EPA REGION IV
ATLANTA, GA

Milliken & Company and National Starch and Chemical Corporation's claim for contribution under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601 et seq.

As grounds for their motion, the third-party defendants assert that CERCLA does not provide for a right to contribution between joint tortfeasors, or in the alternative, that if contribution is available under CERCLA, the right to contribution is several, rather than joint and several. Third-party plaintiffs opposed the motion for summary judgment and third-party plaintiff Milliken & Company opposed the partial motion for summary judgment. Plaintiff, United States of America, although not directly affected by the motion, opposed the third-party defendants' motion for summary judgment. The parties opposing the motion assert that CERCLA does provide for a right to contribution between joint tortfeasors.

This action was instituted by plaintiff United States pursuant to Sections 104 and 107 of CERCLA, 42 U.S.C. §9601, §9607 for recovery of costs incurred and to be incurred by the United States in response to the release or threatened release of hazardous substances from a waste disposal facility known as the Medley Farm site. Defendants Milliken & Company and National Starch and Chemical Company filed third-party complaints against the third-party defendants alleging a right to contribution under CERCLA.

Section 107(e)(2) of CERCLA, 42 U.S.C. §9607(e)(2) provides that:

> Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

Id.

In Wehner v. Syntex Agribusiness, Inc., 616 F.Supp. 27, 30-31 (E.D. Mo. 1985), the court cited this section of CERCLA and noted that CERCLA

implicitly recognizes a right to contribution. Similarly, in Colorado v. ASARCO, 608 F.Supp. 1484, 1486-92 (D. Colo. 1985) the court concluded, after a thorough review of CERCLA's legislative history, that 42 U.S.C. §9607(e)(2) implicitly provided for a right to contribution. Judge Simons, in United States v. South Carolina Recycling and Disposal, Inc., 20 ERC 1753, 1759 n.8 (D.S.C. 1984) noted with approval the court's reasoning in United States v. Chem-Dyne Corp., 572 F.Supp. 802 (S.D. Ohio 1983), that Section 107(e)(2) permits actions for contribution among parties held jointly and severally liable.

Congress, in enacting CERCLA, was aware that the great majority of states permit a right of contribution where joint and several liability exists. In fact, eighty percent of states have recognized this right. United States v. Conservation Chemical Co., 619 F.Supp. 162, 226 (W.D. Mo. 1985). Congressional action in adopting CERCLA should be viewed in its "contemporary legal context". Cannon v. University of Chicago, 441 U.S. 677 698-99 (1979). Clearly, Congress knew and understood that in contemporary circumstances, a right to contribution is a necessary adjunct to the imposition of a broad-based, no-fault liability scheme.

Judge Simons, in dicta in United States v. South Carolina Recycling and Disposal, Inc., 20 ERC 1753, 1759 n.8 (D.S.C. 1984) found that CERCLA had a right to contribution under federal common law and rejected the use of state common law on contribution because of the need for uniformity. Federal district courts which have reached the question of contribution have uniformly held that under federal common law, CERCLA provides for a right to contribution. See e.g., United States v. Chem-Dyne Corp., 572 F.Supp. 802 (S.D. Ohio 1983).

> [Q]uestions of determining 'equitable shares of the liability' with respect to an indivisible injury are appropriately resolved...after plaintiff has been made whole.

CONCLUSION

Because CERCLA provides for a right to contribution among joint tort-feasors as a matter of law, third-party defendants' motion for summary judgment must be denied. The third-party defendants' motion for partial summary judgment presents a mixed question of law and fact which should await resolution at trial.

WHEREFORE, IT IS ORDERED that third-party defendants' motion for summary judgment against third-party plaintiffs is DENIED.

IT IS FURTHER ORDERED that the ruling on third-party defendants' motion for partial summary judgment is reserved until trial.

DATE this 1 day of July, 1986.

Anderson, S.C.

G. ROSS ANDERSON, JR.
United States District Judge

A TRUE COPY
Attest: John W. Williams, Clerk
By Carolyn Mann
Deputy Clerk